Pennsylvania State Corrections Officers Association *and* Business Agents Representing State Union Employees Association. Cases 04–CA–037648, 04–CA–037649, and 04–CA–037652

March 23, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On March 17, 2011, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

[1] The Acting General Counsel mistakenly contends that the judge failed to find an effects-bargaining violation with respect to employee Sonya Corish's discharge. It is clear from the judge's decision that he did find that violation.

[2] We adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to give effect to and repudiating a July 19, 2010 collective-bargaining agreement (the July 19 agreement) negotiated and executed by the Charging Party and the Respondent's outgoing president, Donald McNany. Contrary to the judge, we find that McNany remained president until his successor, Roy Pinto, was sworn in on July 20, 2010. Nevertheless, we agree with the judge that, pursuant to the Respondent's constitution, McNany lacked actual authority to bind the Respondent to the July 19 agreement, absent approval from the Respondent's executive board.

We also agree with the judge that McNany lacked apparent authority to bind the Respondent to the July 19 agreement. Apparent authority "results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the agent to perform the acts in question." *Corner Furniture Discount Center*, 339 NLRB 1122, 1122 (2003). The Acting General Counsel contends that the Charging Party would reasonably have believed, based on McNany's status and duties as president, that McNany had authority to enter into the July 19 agreement without executive-board approval. We disagree. The July 19 agreement was negotiated by McNany and Shawn Hood, the Charging Party's president and bargaining agent. Hood has been an active member of the Respondent since its founding in 2001, and had, before his termination, represented the Respondent as a business agent since 2003. Hood was involved in the Respondent's internal politics and actively supported McNany in his 2010 campaign for reelection. Hood also admitted to being familiar with at least some portions of the Respondent's constitution. Based on Hood's knowledge of, and involvement in, the Respondent's inner workings, we are satisfied that he did not reasonably believe that McNany had authority to bind the Respondent to the July 19 agreement.

[3] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Pennsylvania State Corrections Officers Association, Harrisburg, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Business Agents Representing State Union Employees Association (BARSUEA) by implementing changes in wages, hours, or other terms and conditions of employment of unit employees without giving BARSUEA prior notice and an opportunity to bargain about those changes and their effects.

(b) Refusing to bargain collectively with BARSUEA by unreasonably delaying in providing relevant information requested by BARSUEA.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify, and, on request, bargain with BARSUEA as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time business agents and support staff employed by the Respondent, excluding all other employees, guards, and supervisors within the meaning of the Act.

(b) On request, bargain with BARSUEA with respect to the effects of its decision to discharge Business Agents Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, and Bill Parke.

(c) Within 14 days from the date of this order, offer employee Sonya Corish immediate and full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Sonya Corish whole for any loss of earnings and other benefits suffered as a result of the unlawful refusal to bargain over her discharge and its effects, in accordance with the remedy section of the judge's decision.

In accordance with his dissenting view in *Kadouri International Foods*, 356 NLRB 1201, 1201 fn. 1 (2011), Member Hayes would delete that portion of the remedy requiring that the minimum backpay due employees should not be less than 2 weeks' pay, without regard to actual losses incurred.

(e) Within 14 days from the date of this order, remove from its files any reference to Corish's unlawful discharge and, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(f) Pay its discharged business agents, Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, and Bill Parke, their normal wages for the period set forth in the remedy section of the judge's decision.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(h) Within 14 days after service by the Region, post at its facility in Harrisburg, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[4] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Business Agents Representing State Union Employees Association (BARSUEA) by implementing changes in wages, hours, or other terms and conditions of employment of unit employees without giving BARSUEA prior notice and an opportunity to bargain about those changes and their effects.

WE WILL NOT refuse to bargain collectively with BARSUEA by unreasonably delaying in providing relevant information requested by BARSUEA.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify, and, on request, bargain with BARSUEA as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time business agents and support staff employed by us, excluding all other employees, guards, and supervisors within the meaning of the Act.

WE WILL, on request, bargain with BARSUEA with respect to the effects of our decision to discharge Business Agents Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, and Bill Parke.

WE WILL pay Business Agents Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, and Bill Parke their normal wages for the period set forth in the remedy section of the Board's decision.

WE WILL, within 14 days of the date of the Board's Order, offer employee Sonya Corish immediate and full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed.

WE WILL make Sonya Corish whole for any loss of earnings and other benefits suffered as a result of our unlawful refusal to bargain over her discharge and its effects, in accordance with the remedy section in the Board's decision.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to Corish's unlawful discharge, and, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION

Henry R. Protas, Esq., for the General Counsel.
Richardson Todd Eagen, Esq., of Harrisburg, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 26 and 27, 2010. The complaint alleges that Respondent (PSCOA) violated Section 8(a)(5) and (1) of the Act by failing to give effect to, and thereafter repudiating, a collective-bargaining agreement between it and the Charging Party Union (the Union or BARSUEA). The amended complaint also alleges that Respondent violated Section 8(a)(5) and (1) by discharging employees represented by the Union without prior notice to the Union and without affording it an opportunity to bargain concerning the discharges and their effects; and by failing to provide, or, as further amended at the hearing, unreasonably delaying in providing, relevant information to the Union. The Respondent filed an answer denying the essential allegations in the complaint.

After the conclusion of the trial, the Acting General Counsel and the Respondent submitted briefs, which I have read and considered. Based on the entire record in this case, including the testimony of the witnesses, and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an unincorporated Pennsylvania association with an office in Harrisburg, Pennsylvania, represents employees in bargaining units within the Commonwealth of Pennsylvania. In a representative 1-year period, Respondent received dues and fees in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly outside the Commonwealth. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

Background and Contested Election for Leadership of Respondent

Since June 2001, Respondent has represented some 11,000 correctional officers at 28 facilities in Pennsylvania's prison system. It is led by a 13-member executive board, including a president and other officers. And it operates under a written constitution that sets forth the responsibilities and duties of its officers and governing executive board. (Tr. 22; GC Exh. 2.) Respondent's headquarters are located in Harrisburg, where its president and other officers and employees maintain offices.

In May 2009, Ron Pinto, Respondent's eastern regional vice president and a member of its executive board, announced that he was a candidate for the office of president of Respondent in an election that would be held to fill the position in June 2010. The incumbent president, Donald McNany, who had been in office since August 2002, also announced that he was running for reelection. For the last several years, Pinto and his allies were a minority on the executive board, consistently outvoted by McNany and his supporters. (Tr. 49–50.)

A mail-ballot election to select Respondent's officers and executive board was scheduled for June 2010. Although there were three slates of candidates, the real contest was between McNany, and his mostly incumbent slate, and Pinto, whose slate included some incumbents, but was regarded as the insurgent group. The ballots were mailed to the membership in late May and completed ballots were counted on June 25, 2010, at the offices of the American Arbitration Association in Philadelphia. (Tr. 19, 51–52.) Pinto received a majority of the votes for president, and some candidates on his slate were also elected. But some of the other positions required a runoff election because no candidate had received a majority. (R. Exh. 1; Tr. 26.) The runoff election was held on August 17, 2010. (Tr. 161.) After the runoff election, the Pinto slate controlled all of the 13 executive board positions.

After the June 25 announcement of the vote results for president, there was confusion as to when Pinto was going to take office and when McNany would leave office. McNany, who lives in Butler, some 230 miles from Harrisburg, moved out of the president's office in Harrisburg on June 29. On that date, Pinto moved into the office. However, in some respects, McNany continued to act as president and some of the incumbent officers and board members continued in office until the results of the runoff election were announced a month later. In addition, the Elections Committee, which apparently supervised the election, sought a manual recount of the election results,

further delaying an orderly transition. In support of his effort to clarify the situation, Pinto filed a lawsuit to certify the election results and determine when exactly he could take office. On July 15, 2010, Judge Andrew Dowling of the Court of Common Pleas for Dauphin County, issued a memorandum opinion and order providing, inter alia, that Pinto and four other elected officers and executive board members be certified as having won their positions effective July 8, 2010. (GC Exhs. 7, 8.) Later that day, Pinto announced that he would be sworn in as president on July 20; he was in fact sworn in on July 20 at Respondent's headquarters in Harrisburg.

The Union Wins Representation Rights for Respondent's Employees and Concludes an Agreement with McNany

On June 25, 2010, the Union filed an election petition with the Board's Regional Office in Philadelphia seeking to represent Respondent's roughly 20 business agents and staff employees. (Tr. 24, 85; GC Exh. 3.)[1] The petition was faxed to the Regional Office late in the day on June 24 by Shawn Hood, the Union's president and a business agent for Respondent. Hood had been a supporter of the loser in the presidential election, Donald McNany, and was present in Philadelphia when the vote count was announced on June 25. Hood had indicated on the election petition that the Respondent's representative was Ron Pinto so it was served on Pinto. Since Pinto had not yet taken office when the petition was served on him, on June 28, he walked across the hall to McNany's office and hand delivered the petition to McNany. (Tr. 14–15.)

On July 1, 2010, the Respondent and the Union entered into a stipulated election agreement, approved by the Region, setting an election for July 12, 2010, in the following unit:

> All full-time and regular part-time business agents and support staff employed by the Respondent, excluding all other employees, guards and supervisors.

(GC Exh. 4; Tr. 26–27.) The election was held as scheduled and the Union won. On July 21, 2010, the Board certified the Union as the official bargaining representative of the Respondent's employees. (GC Exh. 6.)

Between the election and the Board's certification, McNany, on behalf of Respondent, and Hood, on behalf of the Union, engaged in three negotiating sessions, the last of which was to go over the language of and sign a final collective-bargaining agreement. At the last session, on July 19, McNany and Hood signed the agreement, which had a 5-year term and contained new and generous severance and other benefits. (Tr. 33–35, 59, 60–63; GC Exh. 9.) McNany and Hood met in western Pennsylvania, where they both lived, not at Respondent's Harrisburg offices. (Tr. 69–70.) Nor did McNany consult Respondent's executive board or Pinto on any matter involving the Union's representation rights, the negotiations, or the collective-bargaining agreement he and Hood signed. (Tr. 54–60.) McNany testified that, at the end of July, he submitted a copy of the collective-bargaining agreement to Sam Brezler, the outgoing secretary of Respondent. Brezler was retiring and had not run for reelection; he was still in office, awaiting the selection of his successor, who would be chosen in the runoff election on August 17, 2010. (Tr. 38–39, 72.)

The Union's Information Request

On July 20, 2010, the Union's secretary-treasurer, Patricia Hurd, prepared a letter asking Respondent to provide the names and addresses of the unit employees. Hurd, who, as one of Respondent's business agents, had an office at Respondent's Harrisburg headquarters, placed a copy of the letter in McNany's mailbox at headquarters. But, because Pinto was being sworn in as president that day, she also placed a copy, along with a covering note, in Pinto's mailbox at headquarters. (Tr. 140–142; GC Exhs. 11, 12.)

Hurd received no response to her July 20 request so she sent another request, dated August 16, 2010, to Jason Bloom, Respondent's western regional vice president, asking for the same information she had requested the month before. (GC Exh. 13; Tr. 144–145.) The Union received no reply to this letter, but, on November 9, 2010, after the initial complaint issued in this case, Respondent's lawyer did provide the requested information to the Union. (R. Exh. 11; Tr. 205, 146–147.) Pinto testified that he was unaware of the July 20 request, and, although he was aware of the August 16 request, he did not answer that request immediately because he was seeking evidence of the Union's certification, which he did not confirm until August 23. (Tr. 216–217.) Although the complaint simply alleges that the information was not provided, at the hearing, counsel for the Acting General Counsel effectively amended the complaint on this issue and now alleges that the Respondent unreasonably delayed providing the information. (Tr. 142–143.)

Respondent's New Regime Discharges Some Employees and Refuses to Acknowledge the July 19 Bargaining Agreement

According to Jason Bloom, who was reelected to Respondent's executive board on the Pinto slate as western regional vice president in June 2010, the Pinto slate's platform on Respondent's business agents and employees was essentially one word, "change." (Tr. 226–227.) In accordance with that view, on July 17, 2010, Bloom sent a letter to all 13 business agents of Respondent asking each of them to submit a letter of interest to be considered for a continued business agent position by the end of the day on July 20. The letter stated that those who were not interested in remaining as business agents should return Respondent's property in their possession and that those who wanted to remain would be scheduled for interviews. (R. Exh. 7; Tr. 228–229.) All but one indicated an intent to remain. (Tr. 229.) Bloom conducted interviews in the first 2 weeks of August. On August 20, 2010, seven of the business agents were notified that they had been terminated and that they should make arrangements to return to their positions as correctional officers. (GC Exh. 14.) Subsequently, the terminations of two of the business agents, those of Robert Smith and Larry Blackwell, were rescinded and they were retained by Respondent. (Tr. 232.)[2]

[1] At that time, Respondent employed 13 business agents and 7 clerical employees.

[2] As indicated in the termination letters, the Respondent's business agents were on leave of absence from their positions as corrections

One other employee was discharged by Respondent after the Pinto team took office. She was Sonya Corish, a staff employee, who carried the job description of lung and heart clerk. She was terminated on August 18 (Tr. 232–234).

On August 23, 2010, the Union filed grievances with the Respondent alleging that it had violated the July 19 collective-bargaining agreement by "terminating employees without just cause," failing to pay them "the negotiated severance and unused leave," and failing to bid the vacant positions. (GC Exh. 15.)

On August 27, 2010, Respondent, through its lawyer, sent the Union a letter in response to the grievances. The letter stated that the Respondent had just recently learned of the existence of the Union and its July 19 collective-bargaining agreement. The letter also stated that the agreement was void because McNany had no authority to sign the agreement on behalf of the Respondent since he had been voted out of office and the agreement had not been approved by Respondent's executive board, as required by Respondent's constitution. (GC Exh. 16.)

On January 3, 2011, Respondent entered into a new collective-bargaining agreement with the Union. That agreement, which runs for a term of 1 year and dispenses with the lucrative severance and other benefits in the July 19 agreement, was signed by President Pinto and a representative of the Union. (R. Exh. 10.) Unlike the July 19 agreement, the new agreement was approved by Respondent's executive board. (Tr. 204–205.)

Discussion and Analysis

The complaint presents three basic questions: (1) Did the Respondent violate Section 8(a)(5) and (1) of the Act by failing to give effect to, and repudiating, the July 19 collective-bargaining agreement negotiated and signed by McNany and Hood; (2) Did Respondent violate the Act by, unilaterally and without giving prior notice to the Union, discharging employees in August 2010, and failing to bargain over the discharges and their effect; and (3) Did Respondent unreasonably delay providing information to the Union in response to its information request. Respondent contests the validity of the July 19 collective-bargaining agreement, but does not contest the Union's representative status. Thus, the complaint allegations must be considered in that light.

Failing to Give Effect to and Repudiating the July 19 Bargaining Agreement

The Acting General Counsel's allegation that Respondent unlawfully failed to give effect to and repudiated the July 19 collective-bargaining agreement turns on whether McNany had the authority to negotiate and execute the agreement. I agree with the Respondent that McNany had no such authority.

First of all, when McNany negotiated and signed the agreement, he was the defeated former president of Respondent. The vote count announced on June 25 not only showed that Pinto had received a majority of the votes cast for that position, but that McNany was not even a close second. He trailed Pinto by over 1000 votes, out of the some 4500 votes cast for three presidential candidates. (R. Exh. 1.) Although there was some confusion as to exactly when the new president would take office, that was a technicality eventually resolved by a state court judge, who ruled, on July 15, that Pinto should be certified as having won the presidency as of July 8. Actually, McNany had physically abandoned his office in Harrisburg on June 29, and Pinto moved into that office on the same day. McNany had retreated to his home in Butler, Pennsylvania, 230 miles away from Respondent's headquarters in Harrisburg. Nor did McNany seek, or receive, any specific authority to negotiate or sign an agreement from either the executive board or the newly elected president. In these circumstances, I find that McNany had no actual authority to negotiate or sign the July 19 bargaining agreement.

Even if McNany could, by some stretch of the imagination, still be considered president of Respondent when he negotiated and signed the July 19 agreement, he did not have the authority, under Respondent's constitution, to bind Respondent without the approval of Respondent's executive board, which he never sought or received. At the outset, the July 19 agreement committed Respondent to wages and benefits well in excess of the $5000 limit, beyond which executive board approval was required. (Tr. 60–63.) Contrary to McNany's testimony, the absence of any provision in the constitution governing collective bargaining for Respondent's employees does not give him the authority to conclude such agreement in excess of the $5000 limit. Even though the constitution is silent on the authority over bargaining agreements, the constitution does give the executive board, not the president, authority over financial commitments and personnel and benefits policies that are typically covered by bargaining agreements. (See GC Exh. 2, pp. 9–11; Tr. 60–66.) The executive board is also empowered to enter into agreements necessary to effectuate its purposes and objectives. (GC Exh. 2, p. 10.) The record contains documentary evidence showing that the executive board regularly approved agreements, financial commitments, and personnel policies in accordance with its constitutional authority. (See Tr. 240–264, and accompanying exhibits.) Indeed, the "governing authority" of Respondent resides in the executive board and the president simply has the responsibility to enforce and carry out "the policies established" by the executive board. (GC Exh. 2, p. 4 and 9.) Nor, contrary to McNany's testimony, does the president have the sole authority to construe or interpret the constitution. That responsibility may initially fall upon the president, but the constitution clearly states that the president's authority is "subject to the approval of the executive board." (Tr. 68; GC Exh. 2, pp. 5–6.) Thus, the ultimate authority to commit Respondent to a collective-bargaining agreement rests not with its president, but with its executive board.

Nor did McNany have apparent authority to bind Respondent to a collective-bargaining agreement. Apparent authority "results from a manifestation by the principal to a third party that

officers with the Commonwealth of Pennsylvania. Indeed, since January 2007, they were paid a salary by the Commonwealth, which was reimbursed by Respondent. So when they were terminated, the business agents returned to their jobs as corrections officers. Likewise, an outgoing officer of Respondent, such as McNany, who was defeated for reelection, was able to return to his position as a corrections officer. McNany did indeed return to his position as a corrections officer in August 2010.

creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question." *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1122 (2003). "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such belief." Id., cited with approval in *Mastec Direct TV*, 356 NLRB 809, 809–810 (2011). Neither of these situations is present here. Contrary to the Acting General Counsel's assertion in his brief (Br. 33), the Respondent's new leadership gave no signals that McNany was acting in its interests. Quite to the contrary, it vigorously fought against McNany's attempt to remain in office after his election defeat, even to the point of filing a lawsuit to uphold the election results. There was thus no manifestation by anyone from Respondent, aside from McNany, its purported agent, to Hood that would provide a reasonable basis for him, or anyone else, to believe that McNany had the apparent authority to negotiate and conclude a collective-bargaining agreement on behalf of Respondent. See also *300 Exhibit Services & Events, Inc.*, 356 NLRB 415, 418–419 (2010).[3]

Indeed, it appears that Hood and McNany tried to keep their negotiations secret in an effort to conclude an agreement before Respondent's newly elected leadership took office. The agreement, as noted, was signed 1 day before Pinto was sworn in as president. But to rule that McNany was authorized to act on July 19, but not on July 20, would exalt form over substance. Both Hood and McNany knew that McNany had no legitimacy to act on behalf of Respondent at this time. They knew McNany had lost the election as early as June 25. Indeed, Hood himself had named Pinto as Respondent's representative when he filed the election petition before the Union was even selected as bargaining representative. Moreover, a judge had directed that Pinto be certified as the winner of the election as of July 8. And it was generally announced and known throughout the membership on July 15 that Pinto would be sworn in on July 20. But McNany and Hood carried on sham negotiations in an effort, I believe, to give a semblance of legitimacy to the greater benefits, including severance benefits, that the July 19 agreement gave to business agents like Hood, who probably read the handwriting on the wall that he might be ousted by the new regime. Hood had supported McNany in the presidential election and he and McNany colluded to give Hood a questionable one-time payment of over $40,000 shortly before McNany left office, supposedly for a past inequity in pay. Indeed, the check to Hood was issued the day before the election results for Respondent's officers and executive board were announced. (See Tr. 270–292 and accompanying exhibits.) The relationship between Hood and McNany was not at arms length and it infected the whole bargaining process that led to the signing of the July 19 agreement. This provides additional support for my view that McNany had no authority, actual or apparent, to commit the Respondent to a 5-year collective-bargaining agreement that gave unusually generous benefits to business agents like Hood.[4]

In sum, McNany had no authority to enter into the July 19 collective-bargaining agreement. Thus, that agreement has no legitimacy. It follows that Respondent did not violate the Act when it refused to give the agreement any effect and when it repudiated the agreement. I shall therefore dismiss those allegations in the complaint.[5]

The Discharge of Business Agents and a Clerical Employee

The complaint also alleges that Respondent violated its bargaining obligation by discharging employees represented by the Union on August 20, 2010, without giving prior notice to the Union, and by failing to bargain about the discharges and their effects. It is settled that an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing employee wages, hours and other terms and conditions of employment—mandatory subjects of bargaining—without first providing their bargaining representative prior notice and opportunity to bargain over those changes. *NLRB v. Katz*, *369* U.S. 736 (1962). Termination of employment has long been considered a mandatory subject of bargaining, requiring bargaining over discharges after they have occurred. *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991). But the prior notice rule does not automatically apply before discharges actually occur. The Board has held that, where an employer has in place predisciplinary policies that limit discretion, and applies those policies, there is no requirement that the employer bargain before each employee is disciplined, although there may be such a requirement after the discipline is imposed. See *Fresno Bee*, 337 NLRB 1161, 1186–1187 (2002).[6]

Contrary to the Acting General Counsel's assertion that the Union was not given prior notice of the discharge of Respond-

[3] There is testimony that Hood asked McNany, at one point during the negotiations, whether McNany needed to get anyone else involved and McNany replied in the negative. That statement does not establish apparent authority. In fact, it supports the notion that Hood knew he was on shaky ground in dealing with McNany. In any event, it is well settled under general agency principles that the statements of a purported agent cannot establish the existence of an agency relationship. *Karavos Campania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 11 (2d Cir. 1978), citing authorities.

[4] For example, the July 19 agreement commits Respondent to pay 13 business agents, including Hood, salaries of over $70,000 each for 5 years, provides for a $5000 per month credit card authorization and $100,000 travel and life insurance for each agent, and provides for a severance package to each agent that amounts to 2 months salary for every year of service. For someone like Hood, that would net him over $70,000 in severance pay. Tr. 60–63.

[5] In support of his position, the Acting General Counsel cites (Br. 27 fn. 17, 31) *Teamsters Local 575*, 259 NLRB 344 (1981). But that case is distinguishable. In *Teamsters*, unlike here, the issue was whether the employer's former leadership unlawfully assisted the clerical union, which obtained bargaining rights and later negotiated and signed a bargaining agreement with the employer. Moreover, unlike in this case, in *Teamsters*, the outgoing official who signed the bargaining agreement on behalf of the employer did so before he was voted out of office and he secured an opinion from counsel that he was not required to obtain the approval of the executive board.

[6] In *Alan Ritchey, Inc.*, 354 NLRB 628 (2009), a two-member panel of the Board cited *Fresno Bee* with approval and observed, at fn. 11, that *Fresno Bee*, which found no violation, was not irreconcilable with *Washoe Medical Center, Inc*., 337 NLRB 202 (2001), a case finding a violation.

ent's business agents, the record shows that such notice was given. On July 17, all of Respondent's 13 business agents were sent a letter asking them to submit a letter of interest to retain their jobs. The letter stated that those who expressed an interest in keeping their jobs would be interviewed. The clear implication was that continued employment depended on a successful interview. This should have put all business agents on notice that they might be terminated. Since this was the entire unit of business agents, such notice was tantamount to notice to the Union. Among those receiving the July 17 letter were the Union's president and its secretary-treasurer. Yet the Union made no request to bargain prior to the interviews or the possible terminations. In these circumstances, I find that the Union had adequate notice of the impending terminations and its failure to request bargaining permitted Respondent to carry out the termination decisions implicit in the July 17 notices unilaterally. Accordingly, the complaint is dismissed insofar as it alleges a violation with respect to the discharge of the business agents on August 20, 2010, without giving the Union prior notice or opportunity to bargain.

The discharge of clerical employee Sonya Corish is a different matter. She was not a business agent so she did not receive a copy of the July 17 notice. Indeed, neither she nor the Union received prior notice that she might be discharged. However, the Respondent interposes another defense to the complaint, which has particular application to Corish's situation. Respondent contends, contrary to the testimony of former President McNany, who insisted all of Respondent's employees were at-will employees, that the employees were covered by a predisciplinary policy that severely limited Respondent's discretion. The existence of such a policy, Respondent further contends, relieved it of any advance bargaining obligation, at least as to Corish's termination, under *Fresno Bee*, cited above.[7]

In support of its contention, Respondent refers to a policy statement issued to all of Respondent's executive officers by former President McNany on May 12, 2003. The statement pointed out that, at a May 7, 2003 executive board meeting, "we discussed and will implement the following disciplinary process:

> 1. Counseling session—Verbal, with notation of same in supervisory file.
> 2. Letter of reprimand—Copy to individual and supervisory file.
> 3. Unpaid suspension—Length of suspension will by determined by the offense.
> 4. Termination."

The policy statement concluded that "[b]y following this procedure, we will be able to establish just cause for any and all discipline imposed." (R. Exh. 3.) This policy statement was placed in Respondent's regularly maintained policy booklet that contained many other personnel policies that had been approved by the executive board. (Tr. 241–244.)

The problem with Respondent's position is that, when it discharged Corish, it did not apply the above disciplinary policies. It summarily discharged her for incompetency. It did not consider counseling, reprimand, or suspension before discharging Corish. (Tr. 166–168.) In these circumstances, I find that Respondent utilized virtually complete discretion when it discharged Corish. Since Corish was represented by the Union and the discharge obviously affected working conditions, I find that Respondent could not discharge her without providing prior notice and an opportunity to bargain to the Union. At the very least, had the Union been given prior notice, it could have insisted that Respondent adhere to its disciplinary policies when considering Corish's discharge. Ironically, Respondent is in the unusual, and, indeed, inconsistent, position of urging the existence of disciplinary policies as a defense to the violation alleged, but not following those very policies when it unilaterally discharged the individual. In these circumstances, I find that Respondent violated Section 8(a)(5) and (1) of the Act by discharging Corish without bargaining with the Union over both its decision to discharge her and the effects of that decision.

There is one remaining question: Was the Respondent required to bargain with the Union over the effects of the decision to discharge the business agents, even though there was no obligation to bargain prior to the decision because adequate notice was given to the Union? It is clear that the Union did not specifically ask to bargain either over the decision or its effects. Ordinarily that would end the matter. But the Union did file a grievance, after the August 20 discharge of the business agents, alleging that Respondent had violated the July 19 bargaining agreement by terminating employees without just cause. The July 19 bargaining agreement was, of course, not a valid agreement. But the grievance over the discharges essentially amounts to a request to bargain over the effects of the decision to discharge the business agents. Surely, an incumbent union may file a grievance, which essentially amounts to a request to bargain, even in the absence of a valid collective-bargaining agreement. I do not believe that the Union and the employees it represents should be penalized for the Union's having based its grievance on the void bargaining agreement. Had the Union known that it could not rely on the agreement and its grievance procedure to protect the rights of its members, it surely would have requested bargaining over the effects of the discharge decisions. I will therefore treat the grievance filing as a request by the Union to bargain over the effects of the decision to discharge the business agents. Respondent clearly failed to bargain over the effects of the discharge decision. Accordingly, I find that Respondent violated Section 8(a)(5) and (1) by failing to bargain over the effects of the decision to discharge the business agents. See *Ryder Distribution Resources*, above, 302 NLRB at 90.

Although Respondent need not bargain over the decision to discharge the business agents, it is required to bargain over its effects. I understand that the business agents returned to their former jobs as corrections officers. Their losses thus may be

[7] Respondent also raises this as an alternative defense to the allegation involving the business agents. But I do not reach the issue with respect to the business agents because, in their case, there was adequate prior notice before the discharges were effectuated, thus relieving Respondent of the requirement to bargain with the Union before effectuating the discharges.

minimal. But there may be severance pay and other accrued, but unpaid, benefits, such as vacation or sick pay, that could be involved in effects bargaining. Any severance pay due the business agents in this case would be subject to the bargaining process and Respondent is not required to agree to anything, provided it bargains in good faith to impasse on the issue. Moreover, the typical remedy for effects bargaining, under the Board's order in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), sets a floor of 2 weeks backpay, a not unreasonable severance package, in view of the bargaining violation I have found.

The Information Request

This is an easy one. Respondent did not provide the information requested by the Union until November 9, 2010, after the complaint issued alleging an unlawful refusal to provide the information. This was almost 5 months after it was first requested. Even assuming that the new regime did not know about the first request, it is clear that Respondent knew of the second request, which was made on August 16. Respondent has no explanation for why it waited for another 2-1/2 months before providing the requested information, which was clearly, indeed, presumptively, relevant. Nor was the request onerous. It simply asked for the names and addresses of the roughly 20 employees in the unit, information to which it was clearly entitled. Respondent's delay in providing the information was thus unreasonable. I find that, by its unreasonable delay in providing the information, Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(5) and (1) of the Act by discharging employee Sonya Corish without giving the Union prior notice and an opportunity to bargain over the discharge or its effects.
2. Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain over the effects of its decision to discharge business agents and employees Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, and Bill Parke.
3. Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying in providing information to the Union.
4. The above violations are unfair labor practices affecting commerce within the meaning of the Act.
5. Respondent has not otherwise violated the Act.

REMEDY

Having found that Respondent violated the Act in certain respects, I shall recommend that it cease and desist from engaging in such conduct, take affirmative action to remedy its violations, and post an appropriate notice. The Respondent will be ordered to bargain with the Union concerning its decision and the effects of its decision to discharge employee Sonya Corish and the effects of its decision to discharge employees Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, and Bill Parke. Respondent will also be ordered to reinstate employee Sonya Corish and make her whole for any losses she may have suffered because of its unlawful refusal to bargain over her discharge. See *Lapeer Foundry & Machine*, 289 NLRB 952, 955–956 (1988). Any backpay owing, less any net interim earnings, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent's failure to engage in effects bargaining on the discharge of employees Dyches, Hood, Hurd, Miller, and Parke shall be remedied by a backpay remedy similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998). Thus, the Respondent shall pay those employees backpay at their normal wages from 5 days after the date of this order until the earliest of the following conditions: (1) the date Respondent bargains to agreement as to the effects of the discharges; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this order or to commence negotiations within 5 days after receipt of Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith. In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date they were discharged to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event, shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent's employ. Backpay, less any net interim earnings, shall be computed in accordance with the Board cases cited above, in connection with Corish's backpay.

[Recommended Order omitted from publication.]